IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.277 OF 2005

1) Pandharinath Shankar Kanaskar

2) Navnath Shankar Kanaskar

3) Smt. Bhamabai Shankar Kanaskar..Appellants
(Orig. Defendants)

Versus

1) Smt. Laxmibai @ Ranjanabai Maruti Kanaskar

2) Mangesh @ Bharat Maruti Kanaskar

3) (Yashodabai Patibua Mutke)
DEAD

4) Bababai Bhika Gadhade

5) Kasabai Laxman Kokane

5A) Shri Eknath Laxman Kokane

5B) Shri Namdeo Laxman Kokane

5C) Tukaram Laxman Kokane

5D) Shri Sopan Laxman Kokane

5E) Shri Nivrutti Laxman Kokane..Respondents
(Respondent Nos.1 and 2 -
Orig. Plaintiffs,
Respondent Nos. 3 to 5-
Orig. Defendant Nos.4 to 6)

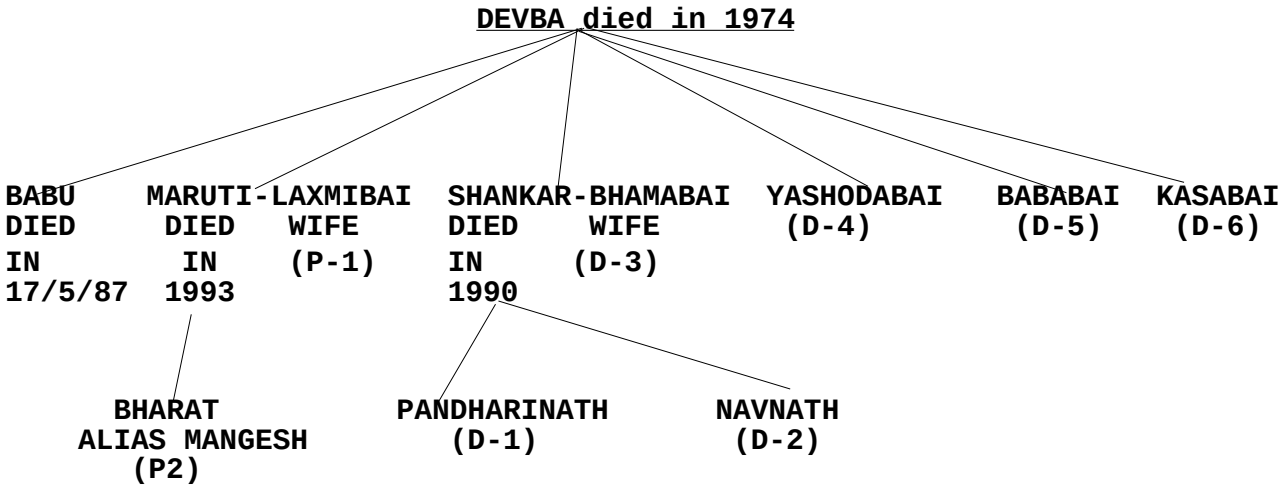
Adv. Mr. D.K. Ghaisas for the Appellants
Adv. Mr. R.A. Thorat with U.B. Nighot for the Respondent Nos.1 and 2.

CORAM : S.R. SATHE,J.
DATED : 19/07/2007

ORAL JUDGEMENT :-

1. The appellants-original defendants in Regular Civil Suit No.111/1993 have preferred this appeal against the Judgement and order passed by the 11th Ad-hoc Additional District Judge, Pune in Civil Appeal No.489 of 2003 whereby decree passed by the Joint CJJD, Junnar for partition and separate possession was confirmed and appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'defendants'.

2. In order to appreciate the facts giving rise to this appeal, it would be worthwhile to set out the genealogy showing relations between Plaintiffs and defendants.



3. The suit property consisting of landed property and house property situated at village Nimdari, Taluka : Junnar, described in detail in para-1(a)&(b) of the plaint is the ancestral property of the Plaintiffs and defendants. According to Plaintiffs, partition had never taken place between the Plaintiffs and defendants and Plaintiffs were having 2/5 share jointly in the suit property whereas the defendant Nos. 1,2 and 3 were having together 2/5 share. Three daughters of Devba were each having 1/15 share. Devba died in the year 1974 leaving behind 3 sons namely Babu, Maruti and Shankar and 3 daughters Yashodabai (D4), Bababai (D5), Kasabai (D6). Babu died in the year 1987 leaving behind no heirs.

4. In the year 1993, Plaintiffs found that conduct of defendant No.1 was pre-judicial to the interest of Hindu Joint Family. Plaintiffs, therefore, asked defendant No.1 to give by partition their 2/5 share. For that purpose meeting was also called on 01/06/1993. However, the defendant No.1 flatly refused to give the partition. Hence, on 03/06/1993, plaintiffs issued notice through advocate to the defendant No.1 and called upon her to give partition and separate

possession of their shares. Inspite of the same, the defendants did not effect the partition and separate possession. Hence, Plaintiffs filed the present suit for partition and separate possession.

5. The defendant Nos. 1 and 3 filed their Written Statement at Exh-21 and opposed the suit claim. They admitted the relations between the parties and the fact that the suit property was the ancestral property of Plaintiffs and defendants. They, however, contended that during lifetime of Devba, he performed marriages of his daughters namely defendant Nos.4,5 and 6 and cancelled their share in the suit property. Thereafter, Babu, Maruti and Shankar, brothers of Devba stayed together for some years. However, in 1987 Babu died leaving behind no heirs. Then for some period, Maruti and Shankar stayed together. But, Plaintiff No.1 Laxmibai left Maruti and started residing separately at her maiden home. Maruti was not doing any work.

6. Shankar, father of defendant Nos. 1 and 2 was serving at Mumbai and was having his own income. When Babu and his wife were ill Shankar met their medical expenses. Not only that but he had in fact spent money when Devba was ill for his treatment and thereafter for

the funeral of Devba. According to defendants, Shankar had even repaid family loan of Rs.50,000/- out of his own income. Considering all these things, 'Vyavasthapatra' (deed for family arrangement) was executed by Maruti and Shankar on 21/05/1958 and as per the said 'Vyavasthapatra', Maruti relinquished all his rights in the suit property in favour of Shankar. The defendants, therefore, contended that as a result of the said 'Vyavasthapatra' plaintiffs are not having any right in the suit property and said 'Vyavasthapatra' is binding on them. The defendants, therefore, prayed for the dismissal of the suit.

7. The defendants No.2 Navnath filed separate Written Statement Exh-31 and took similar contentions.

8. On the pleadings of the parties the learned Trial Judge framed issues at Exh-39. In order to prove their respective claims both the parties adduced oral and documentary evidence. After considering the said evidence and holding that the alleged 'Vyavasthapatra' not being registered has no value and the defendants have failed to prove that Maruti has relinquished his rights in favour of Shankar. The learned Trial Judge held that the Plaintiffs have proved that suit property

is joint family property of Plaintiffs and defendants and Plaintiffs together are having 5/12 share in the same. He also held that defendant Nos. 1 to 3 are also having together 5/12 share and defendant Nos. 5 and 6 are having share 1/12 each. He, therefore, decreed the suit accordingly.

9. Being aggrieved by the said order the defendants filed Civil Appeal No.489 of 2003. However, the same also came to be dismissed holding that 'Vyavasthapatra' Exh-87 is not sufficient to prove that Maruti had relinquished his rights in favour of Shankar.

10. The above mentioned order is challenged by the defendants in the present appeal.

11. In this appeal before me, Shri Ghaisas, learned Advocate for the defendants has urged 3 points. Firstly, he submitted that both the Courts below have not properly appreciated the evidence on record and have failed to hold that Maruti had relinquished his rights by virtue of 'Vyavasthapatra' Exh-87. Secondly, he canvassed before me that once 'Vyavasthapatra' was exhibited, it was necessary for the Courts below to

consider the same in evidence and accept the contents of the same, as the heirs of Shankar had executed a deed of declaration and thereby cured the defect of non-registration of 'Vyavasthapatra'. Lastly, he submitted that the Courts below ought to have taken into consideration the provisions of section 53(A) of the Transfer of Property Act and should have held that Plaintiffs are not entitled to get partition. He, therefore, submitted that the appeal be allowed and decree passed by the Courts below be set aside and Plaintiff's suit be also dismissed. As against this, Shri R.A. Thorat learned Advocate for the Respondent Nos.1 and 2 supported the judgement and order passed by the learned Trial Judge and prayed for the dismissal of the appeal.

12. From the pleadings of the parties and evidence on record it is clear that admittedly there was joint family of Plaintiffs and Defendants and the suit properties described in para-1 of the plaint were the joint family properties. According to Plaintiffs, suit property continued to be joint and at no point of time, there was any partition of the said property between Plaintiffs and Defendants are rather between the predecessors of Plaintiffs and defendants. It is

needless to say that normal state of every Hindu Family is joint. Merely because some member of the family is residing at different place that by itself is not sufficient to hold that he has been severed from the joint family or that joint family has come to an end. Presumption that the Hindu Family continues to be joint is mainly available when the question arises whether a specific property which was admittedly joint at one time has continued to be joint family or it has seized to be joint by virtue of separation. It is well settled that if a joint family possessed joint property which was admittedly joint, the presumption would be that the property continues to be joint and the burden would lie upon the member who claims it as his separate property to prove that there was a partition and that he got it on such partition. So, in the instant case when admittedly suit property was the joint family property and according to defendants by virtue of 'Vyavasthapatra' Exh-87 their predecessor in title namely Shankar became the owner of the said property, the burden was on the defendants to prove that by virtue of the said 'Vyavasthapatra' Exh-87, Shankar's brother Maruti had in fact relinquished his rights in the suit property or partitioned the suit property and it was given to Shankar's share.

13. The defendants have produced the said 'Vyavasthapatra'. If we peruse the said document it is very clear that all that has been stated in the said document is that during the lifetime of Devba as well as Babu, Shankar had met the expenses incurred for their illness. Besides this, he had also cleared the family loan and also spent the amount for Maruti and as a result of this, Maruti gave up his right, title and interest in the suit property in favour of Shankar. Thus, it is not in dispute that the nature of the said 'Vyavasthapatra' Exh-87 is that of relinquish deed. Naturally, the entire fate of this appeal depends on the said relinquish deed.

14. Admittedly, the said document Exh-87 is in respect of several lands and house property and the value of the same is more than Rs.100/-. So, as per the provisions of Section-17 of the Registration Act, 1908 the said document which is in the nature of relinquish deed was required to be registered. Admittedly, the said document is not registered and effect of none registration of document which is required to be registered will follow. For this purpose, it would be worthwhile to see what section 49 of the Registration

Act, 1908 says. It runs as follows :-

> ***"49. Effect of non-registration of documents required to be registered –*** *No document required by section 17{or by any provision of the Transfer of Property Act, 1882 (4 of 1882)}, to be registered shall-*
> *(a) affect any immovable property comprised therein, or*
> *(b) confer any power to adopt, or*
> *(c) be received as evidence of any transaction affecting such property or conferring such power,*
>
> *unless it has been registered."*

15. Having regard to above mentioned two provisions namely sections 17 and 49 of the Registration Act, it is very clear that by virtue of the said relinquish deed, there was no valid transfer of rights or it can be said that there was no valid relinquishment of the rights of Maruti and as such, the said document had in fact no effect for putting an end to Maruti's right, title and interest in the suit property and secondly, Shankar had also not acquired any rights under the said document and hence, the suit property continued to be the joint family property of Plaintiffs and defendants.

16. Shri Ghaisas, learned advocate for the defendants strenuously argued before me that in the instant case the document in question namely 'Vyavasthapatra' was exhibited by the Trial Court and as such it was necessary for the Trial Court as well as Appellate Court to consider the said document. In order to support this proposition, he has placed reliance on a case **JAVER CHAND AND ORS. V/S. PUKHRAJ SURANA, AIR 1961 SUPREME COURT 1655,** in which Apex Court has held that once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, the order with regard to admitting the document in evidence is not liable to be reveiwed or revised. He has also drawn my attention to a case **NAGINBHAI P. DESAI V/S. TARABEN A. SHETH 2003(1) ALL M.R. 1006** wherein also the court has observed that once the Court decides the objection, rightly or wrongly and document is admitted in evidence, it is not open to the Trial Court or to the Appellate Court to go behind that order. The propositions in the above mentioned rulings are not at all disputed and can not be disputed. From the perusal of the judgement of the Trial Court and the First Appellate Court it is very clear that both the

Courts below have in fact read 'Vyavasthapatra' Exh-87 in evidence and considered the effect of the same. So, the question of applying above cited rulings of the present case in fact does not arise.

17. Merely because, unregistered document having once accepted and has to be read in evidence that does not mean that the Courts must hold that the said document is legal and valid to give effect to the transaction mentioned therein. So, if relinquish deed is required to be compulsorily registered and it is not so, then merely because the said document is accepted in evidence that does not mean that the said document has in fact proved the requirements of valid relinquishment. Considering this aspect both the Courts below have rightly held that by virtue of the said document Exh-87 it can not be held that Maruti relinquished his right, title and interest in the suit property in favour of Shankar. Finding recorded by both the Courts in this behalf is unassailable.

18. Shri Ghaisas, learned Advocate for the defendant argued before me that in the instant case the heirs of Shankar have in fact executed a deed of declaration on 22/02/2005 and the same is registered.

He, therefore, submitted that the defect of non-registration of the relinquish deed or release deed is rectified by this registered declaration deed. For this purpose, he has relied on section 25 of the Registration Act. It runs as follows :-

> ***"25. Provision where delay in presentation is unavoidable –***
>
> *(1) If, owing to urgent necessity or unavoidable accident, any document executed, or copy of a decree or order made, in (India) is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the Registrar, in cases where the delay in presentation does not exceed four months, may direct that, on payment of a fine not exceeding ten times the amount of the proper registration-fee, such document shall be accepted for registration.*
>
> *(2) Any application for such direction may be lodged with a Sub-registrar, who shall forthwith forward it to the Registrar to whom he is subordinate."*

19. Relying on the above provision, the learned Advocate for the defendants submitted that the first deed namely the relinquish deed or release deed executed on 21/05/1958 is set out in the subsequent declaration deed and execution of the earlier deed is confirmed. So, as the second declaration deed is registered the original relinquish deed is admissible in evidence as proof of the transaction mentioned therein and as such it be held that there is legal and valid relinquishment in favour of Shankar, predecessor in title of the present defendants. However, Shri R.A. Thorat learned Advocate for the Respondent-original Plaintiffs submitted that this subsequent deed or declaration will not help the present defendants because of the provisions of Section-23 of the Registration Act. The said Section runs as follows :-

> ***"23. Time for presenting documents-*** *Subject to the provisions contained in sections 24,25 and 26, no document other than a will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution :*
>
> *Provided that a copy of a decree or order may be presented within four*

months from the day on which the decree or order was made, or, where it is appealable, within four months from the day on which it becomes final."

20. Relying on this proposition, he submitted that in the instant case, declaration deed is executed after 47 years and subsequent deed is only made by the heirs of Shankar. The other side namely the person who according to Plaintiff had executed the relinquish deed namely Maruti is not a party to this deed. Nor the heirs of Maruti i.e. present Plaintiffs are party to the subsequent deed. So, naturally, the subsequent unilateral declaration made by the heirs of Shankar have no effect. I think that there is much substance in this argument and in my considered view in the instant case, the subsequent deed executed in 2005 is not sufficient to hold that Maruti had relinquished his rights in favour of Shankar in the year 1958. So, I am not inclined to accept the arguments advanced by the learned Advocate Shri Ghaisas on this point.

21. The learned Advocate for the defendants submitted that in the instant case after execution of relinquish deed dated 21/05/1958 Shankar and his heirs

are throughout in possession of the suit property. So, even if relinquish deed is not registered as required by law it be held that the parties have acted upon the document in question. Thus, he tried to rely on doctrine of part performance enunciated in Section 53 (A) of the Transfer of Property Act. However, firstly it must be noted that the First Appellate Court after considering the entire oral and documentary evidence on record has given a finding of fact that even after the execution of the alleged relinquish deed the name of Maruti continued in record of rights in respect of the suit property. Not only that but after his death, the names of heirs of Maruti were entered in the record of rights and in column of cultivation it is mentioned "**khudda**". So, it indicates that holders are in possession. Admittedly, there is nothing on record to show that though after 1958, name of Maruti and after him names of his heirs appeared in record of rights neither Shankar nor his heirs took any objection for the said entries. So, the learned First Appellate Judge has held that the conduct and circumstances of the case establish that the alleged relinquish deed or release deed executed on 21/05/1958 is not acted upon. The above mentioned finding of fact is based on material on record. The same is certainly not perverse. There is no

necessity to interfere with the same in the present appeal. So, the arguments advanced by the learned Advocate for the defendants in this behalf can not be accepted.

22. In view of the above discussions, I have no hesitation to hold that both the Courts below have considered the entire evidence in its proper perspective and having regard to the position of law, correctly decreed the suit in Plaintiff's favour. There is no substance in this appeal. Hence, I pass the following order :

O R D E R

The appeal is dismissed.

Under the circumstances of the case, parties to bear their own costs of this appeal.

(S.R. SATHE,J.)